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Title VI Guidance Comments
US Environmental Protection Agency
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Pacific Gas and Electric Company appreciates the improvements that the US Environmental Protection Agency (EPA) has made to this draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance," published at 65 Fed. Reg. 39,650 (June 27, 2000). The draft guidance is now based upon generally sound guiding principles:

- All persons are entitled to a safe and healthful environment;
- Strong civil rights and environmental enforcement is essential; and
- Enforcement should be consistent with sustainable economic development.

However, we remain concerned that the guidance:

- allows complaint filing without impacted community involvement;
- doesn't provide for notice of pending complaints to impacted communities;
- focuses on demographics rather than impacts;
- focuses on reactive permit reviews rather than proactive planning;
- focuses on impact magnitude rather than impact distribution;
- does not adequately define an unacceptable impact or distribution; and
- provides no incentive for better land use planning.

We urge EPA to:

A. open the process to all impacted parties;
B. focus on disparate impacts, not disparate demographics;
C. address existing disparities via planning rather than permitting;
D. focus new permit reviews on distribution rather than magnitude;
E. reduce the uncertainty about what is or is not acceptable; and
F. ease reviews for areas incorporating EJ into land use planning.

A. OPEN THE PROCESS TO ALL IMPACTED PARTIES

EPA's draft Investigation Guidance allows "a person who is a member of a specific class of people that was allegedly discriminated against" to file a Title VI complaint even if that person would not be directly impacted (see item III(A)4(b) on 65 FR 39672).

Persons concerned about potential issues should be required to communicate those concerns to the impacted community, and should be able to elevate those concerns to EPA only if they can persuade at least one member of the impacted community that this should be elevated. While EPA should stress that each individual member of the community is entitled to be protected, EPA should also stress that each individual member is also entitled to self determination of his or her best interest, and EPA will only intervene on behalf of at least one actually impacted person.

Section II-B of the Investigation Guidance, entitled "Roles and Opportunities to Participate," further discusses the role of the complainant and the role of the funding recipient, but it does not discuss the role of the community or facilities impacted (see 65 FR 39671-72). While EPA acknowledges that facilities could be contacted (see 65 FR 39693), there is no assurance that any facilities will be contacted. Nor is there any assurance that the community at large will be contacted. Upon elevation to EPA, **someone should be required to notify the community at large** (including not only the recipient agency, the permittee and other persons impacted by the permittee, but also other sources that might be contributing to a collectively disparate impact, and other parities likely to be impacted by efforts to eliminate that disparate impact). Logically, that burden should fall upon the complainant. EPA has already accepted the far more costly burden of investigating all complaints filed. If EPA does not discourage frivolous complaints by at least insisting upon notification, EPA could find itself dismissing valid complaints due to lack of resources to distinguish between under-documented versus unjustifiable complaints. In recognition that funds are tight within communities of demographic disparity, EPA should make it clear the all such notification costs will be reimbursed with interest, out of funds otherwise due to the recipient agency, if the complaint is found to be valid. If EPA does not have that reimbursement authority, it should seek it. But the community notification requirement should remain. Of course the greater the uncertainty about reimbursement, the more flexible EPA should be about the method of notification: e-mail, fliers, news reports... But EPA should not allow a single individual to file a complaint, and then allow that complaint to be evaluated in relative secrecy. That could freeze out the majority of the impacted community from the entire process.

Opening the process allows the impacted community to negotiate directly with the recipient agency, the permitted source, or other targeted existing sources – on how to most effectively and immediately eliminate the disparate impact. The earliest possible elimination of disparate impacts, not any formal finding of fault, should be the goal. EPA already acknowledges that informal complainant-recipient resolution will be acknowledged (see IV(A)(1) on 65 FR 39673). But resolution of one individual's complaint does not ensure that other individuals might not raise similar issues. EPA guidance should also preclude the dismissal of complaints until the community has had an opportunity to comment upon the proposed dismissal. EPA should apply the same early, open, and inviting process towards input on its complaint reviews as it suggests in II(B)(2) that permit applicants follow in seeking to avoid such complaints.

B. FOCUS MORE ON DISPARATE IMPACTS THAN DISPERATE DEMOGRAPHICS

EPA suggests in 3(f) that:

> "Measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations" (see 65 FR 39661).

But EPA does not suggest a similar statistical standard for impact evaluation. EPA merely states that any significant impact could be disparate and that:

> "The determination of what level(s) of disparity that can be considered significant should take into account the nature of the decision being made (e.g., allocation of resources, triggering further action); the type of disparity comparison; the consistency of results between multiple comparisons; and underlying data quality. In many instances, you should consider both the degree of disparity of population composition with the degree of disparity of estimated level of adverse impact." (see 65 FR 39662).

EPA suggests any exceed of any standard could be significant. EPA also defines "statistical significance" in a way that could encompass impacts below standards:

> "A determination that an observed value is sufficiently large and meaningful to warrant some action." [see 65 FR 39667 and 65 FR 39686].

To the extent that statistical analysis is employed, we would urge that such analysis be used first to identify communities with statistically higher impacts, and only secondarily to confirm whether the impacted community might also have statistically different demographics. Average communities should not receive less protection than disparate communities. Even if EPA deemed its authority to act under Title VI limited to cases where demographic disparity can be demonstrated, EPA has other authority which could be employed. But if EPA wishes to measure demographic disparity, EPA ought not suggest that a different statistical criteria could be used for deeming impacts disparate.

EPA may be tempted to keep community demographics as an initial screening tool for completely new projects which are nominally free to choose their location. But most permits involve renewals or expansions where there is little choice of location. Other "new site" projects may have relatively few site options, because they are tied to specific resources only available at specific locations. For example, some projects may need to be located near impacted areas in order to find sufficient nearby mitigation. EPA could more effectively employ the degree of demographic disparity as an indicator of the level of EPA funded investigation warranted before complaint dismissal, than as an indicator of which impacts are acceptable or unacceptable.

C. ADDRESS EXISTING DISPARITIES VIA PLANNING RATHER THAN PERMITTING

Although EPA considers permit renewal to be an agency action of the same import as permit issuance, in areas like California where thousands of smaller sources are required to obtain permits, renewals are relatively routine events that may trigger emission reports and fee payments, but not typically permit reviews or revisions. The vast majority of decisions on the acceptability of existing impacts, or on what should be done to reduce unacceptable impacts, are made within the attainment planning context, not the permitting context.

Air and water quality attainment planning already requires the evaluation and reduction of cumulative impacts. The air quality process generally occurs over a fairly rapid three-year cycle. The corresponding water quality process just occurs over a longer cycle. Each of these processes provide more appropriate venues for cumulative impact identification and reduction, than would individual project permitting reviews. The attainment processes are also more likely than the new source permitting process to ensure that parties responsible for causing adverse impacts will pay for their elimination. EPA reviews and approves air quality attainment plans and water quality total maximum daily loading plans. EPA also has the authority to impose major sanctions, or to assert primary jurisdiction, if the state or local agencies do not act responsibly. EPA should revise its EJ guidance to distinguish between its review of new site permitting and its review of attainment planning.

Attainment planning typically identifies the point of maximum impact. But it does not typically analyze which areas receive below average, average, or above average impacts. EPA guidelines ought to suggest that every new attainment plan identify areas that receive impacts that are one, two or three standard deviations above the average. We would suggest that be done on an annual average, population weighted, exposure basis to concentrations above established acceptable levels, or to calculated cancer risks above established acceptable risks. That would ensure that no calculations would be required in areas where impacts are universally within allowable or accepted levels. It would also give EPA a measure of the relative severity of the annual average impact, which could be a consideration when evaluating where to place limited investigative resources. But most importantly, it would give potential applicants information helpful to site selection, and impacted communities information helpful to seeking relief. EPA should encourage such planning by adopting a higher threshold for review of EJ complaints relative to existing permit renewals and existing permitted source modifications, for areas that had an accepted attainment plan including an approved impact disparity analyses, and an approved plan for reasonable further progress in reducing existing disparities.

D. FOCUS NEW PERMIT REVIEWS ON DISTRIBUTION RATHER THAN MAGNITUDE

Where existing impacts are deemed "*unacceptable,*" permitting processes expect the newest source to more than fully offset its incremental impact, but not to eliminate any pre-existing imbalance. Often sources are allowed to provide the mitigating reductions at remote sites. This approach facilitates facility modernization and expansion, and reflects the general concept that "a rising tide raises all boats." This approach is most reasonable when dealing with regional air or water pollutants, where maximum impacts are less likely to occur near the source. It is less defensible for hazardous air pollutants where maximum impacts will occur near the sites. EPA should clarify that its application of environmental justice to permit reviews will focus primarily on pollutants deemed to have localized impacts – and primarily upon how the distribution of those localized pollutant impacts for the facility compares to the distribution of the facility mitigation. Any EPA EJ investigation of what level the recipient agency considers acceptable, should focus more on whether the acceptable level is uniformly applied, than on whether a more stringent level should have been selected.

In urbanized areas, hazardous air pollutant impacts from cars, trucks and buses generally exceed those from permitted sources. Projects large enough to cause impacts of disparate magnitude should be large enough to ensure that the areas receiving the greater impacts should also receive greater net benefits from mitigation. Even projects merely contributing to existing disparate impacts should not find it difficult to obtain mitigation within the same disparately impacted zone. However, EPA should allow projects impacting areas of lesser impact to mitigate in areas of greater impact. Put simply, projects should be able to put the mitigation where it is needed the most. This would allow cleaner natural gas trucks and buses operating within more heavily impacted urban areas to mitigate emissions from a new facility operating in less impacted suburbs.

E. REDUCE THE UNCERTAINTY ABOUT WHAT IS OR IS NOT ACCEPTABLE

The guidance states that:

> "A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact are at least a factor of 2 times higher in the affected population"

But that is given as an example, rather than a rule. The vagueness of the EPA guidance preserves agency flexibility, but creates uncertainty. Uncertainty hinders the

modernization and expansion of industry and infrastructure, and could retard progress towards both environmental and economic improvement. There is increasing concern about revitalizing disadvantaged neighborhoods through the cleanup and utilization of brownfields. There is also increasing recognition that the least fortunate members of our society are generally the first to be hurt whenever the economy slows down. We urge EPA to grant states the widest practical discretion to decide for themselves what is or is not the "acceptable" average impact. EPA's Title VI implementation should focus on "*variations"* in impacts above the average or acceptable level, and on the "*distribution*" of impacts versus mitigation. But EPA needs to clearly define for the project proponents, the impacted communities, and the reviewing agencies exactly what it considers to be an "*acceptable*" versus "*unjust*" impact level, variation or distribution. As Craig Arnold stated in *Land Use Regulation and Environmental Justice,* 30 Env'tl L. Rptr. (ELI) 10395, 10397-98 (June 2000):

> "The Interim Guidance adopts a reactive strategy that promotes uncertainty for all involved. Instead of defining clear standards about which facilities and operations will be allowed in which communities, the Interim Guidance encourages ad hoc challenges to proposed or existing environmental permits. The results are:
> (1) affected communities and other environmental justice advocates are always reacting to specific projects rather than proactively establishing clear standards to protect their communities;
> (2) the momentum of an existing or even proposed facility can be difficult to stop;
> (3) state permitting agencies and facility owners/operators face substantial uncertainty about whether a proposed activity will be found to have an impermissible disparate impact . . . and
> (4) a facility owner/operator can invest substantial amounts in a particular facility (including an established, long-permitted facility) and/or permit application only to have it unpredictably investigated and rejected."

F. EASE REVIEWS FOR AREAS INCORPORATING EJ INTO LAND USE PLANNING

To the extent that some impacts may be unavoidable, and someone will always have to be closest to those impacts, differences will remain. Populations of demographic disparity may have less education, less desirable jobs and hence fewer resources to devote to obtaining preferred housing or to opposing undesirable neighbors. In this era of relatively universal "not in my backyard" opposition, even the fairest local agency efforts to fairly implement their permitting programs may lead to demographically uneven outcomes. But an uneven outcome is not necessarily unjust. Where impacting facilities precede their surrounding communities, and land use rules require initial developers -- and subsequent sellers -- of properties expected to experience higher impacts to give notice of those impacts to prospective buyers, EPA should require

impacts to reach a greater level of disparity before becoming actionable.. While EPA cannot require land use planning, EPA can modify its guidance to encourage land use planning.

These comments are filed on behalf of Pacific Gas and Electric Company, an investor-owned gas and electric utility serving about 13 million people over 77,000 square miles of Northern and Central California. If you have any questions about them, please call me at 415-973-6910.

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